



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Data Express

File: B-234685

Date: July 11, 1989

DIGEST

1. Bid, including descriptive literature, that took no exception to solicitation requirements represented an unqualified offer to supply the exact thing requested and, therefore, was responsive. Bidder's submission of upgraded version of item bid for performance testing after bid opening is unobjectionable where the manufacturer had upgraded the item between bid opening and the date for performance testing and the item submitted for testing thus was the current production model.

2. Question of small business' responsibility must be referred to the Small Business Administration for consideration under certificate of competency procedures.

DECISION

Data Express protests the award of a contract to Datec Incorporated under invitation for bids (IFB) No. 51-SOBC-9-00002, issued by the Bureau of the Census for modems. The protester contends that it should have been awarded the contract because it submitted the lowest-priced responsive bid.

We sustain the protest.

Modems are communications devices used to transmit data over telephone lines at different speeds. The accuracy and speed of such transmissions vary according to the sophistication of the modem which is determined by various features, including the requirement to maintain data integrity. The means by which data integrity is maintained is identified by various classes of Microcom Network Protocol (MNP). Initially, the solicitation required class 5 MNP modems for maintaining data integrity. However, based on comments from interested vendors asserting that class 4 MNP modems would be able to satisfy the IFB's stated requirements, the

C-45951/139075

IFB was amended to change the mandatory requirement from class 5 to classes 2, 3, or 4 MNP modems for maintaining data integrity.^{1/} The IFB set forth design and performance requirements and required bidders to submit descriptive literature so that Census could perform a technical review to determine whether the proposed equipment met the requirements. Additionally, the IFB stated that bidders might be required to submit two production models of the modems offered for a performance test conducted by an independent contractor to measure the efficiency of the modem transmissions against industry standards.^{2/}

Bid opening was held on December 29, 1988, and 45 bids were received. The protester's bid price was \$209,300 and the awardee's price was \$250,600. Based on a technical review of the descriptive literature, 10 bids were determined technically acceptable and those bidders were requested to provide modems for testing. Initially, the protester's bid, offering a Western DataCom 424 MNP class 4 model, was not considered technically acceptable. However, on January 12, Data Express called the contracting office and expressed its disagreement with Census' determination that its bid was technically unacceptable. Subsequently, the contracting officer requested that the technical team reevaluate all the bidders' descriptive literature to determine technical acceptability. As a result, 10 additional bidders, including the protester, were found eligible to participate in performance testing. On January 18, the contracting

^{1/} We understand that a higher MNP class number means that a modem generally has more features than a modem with a lower MNP class number. Thus, for example, a class 5 modem can do everything required of a class 4 modem, but a class 4 modem cannot necessarily do everything that a class 5 modem can do.

^{2/} The procurement method used by Census here was unusual, because post-bid-opening testing was used to determine the technical acceptability of the products bid. Generally, the responsiveness of a bid must be determined based upon the bid itself and not on the basis of post-bid-opening submissions. See Aldan Rubber Co., B-212673, Dec. 5, 1983, 83-2 CPD ¶ 645.

agency contacted seven of these 10 firms, including the protester, and requested that they submit modems for performance testing.^{3/} Ultimately, only three of the 17 bidders' modems were certified as having passed all performance tests. All three were class 5 modems.

On January 23, Data Express first attempted to have its modems tested. However, the Census representative noticed that the modems submitted by Data Express were labeled on their front end identification panels as MNP class 5 modems, rather than the MNP class 4 modems bid. The agency official stopped the testing and informed the protester that it would be allowed to have its modems tested only if it submitted the Western DataCom 424 MNP class 4 model bid before the end of the testing period. The protester states that it then offered to change the front end panels to identify the modems as "class 4," and, according to the protester, the Census representative agreed to continue the tests if the panels were so changed.

On January 24, the protester and a Western DataCom representative returned to the testing facility and, in the presence of contracting agency officials, the Western DataCom representative removed from the modems the front end identification panels labeled "class 5" and replaced them with identification panels labeled "class 4." The protester also wrote the modem serial numbers and the following statement on a piece of paper: "The products are identical technically and functionally to the proposed model 424 class 4 modem." The Western DataCom representative told the testing officials that there was no difference between the firm's class 4 and class 5 modems from an operational or specification standpoint and that the only difference was the label. Furthermore, the protester asserts that its representative explained to both Census and testing facility personnel that the modems it submitted for testing were the manufacturer's current production models and that these were the modems it would supply to Census if it were awarded the contract. Notwithstanding their uncertainty as to whether the modems submitted for testing were the same modems offered in Data Express' bid, the government representatives allowed the modems to be tested; the modems successfully passed all stages of the performance test.

Due to the unusual circumstances surrounding the testing of the protester's modems, the contracting officer called

^{3/} Where two or more firms proposed to supply the same brand and model, only the lowest-priced bidder was requested to submit test modems.

Western DataCom on January 30 and gave a Western DataCom employee the serial numbers of the modems tested. The contracting officer was informed that these were class 5 modems and that they have data compression and integrated circuitry features which class 4 modems do not have. Because the modems submitted for testing thus were a different class from the modems offered in Data Express' bid, Census believed it could not determine if the Western DataCom 424 class 4 model offered by Data Express would have passed the required performance tests. Therefore, the contracting agency rejected the protester's bid as non-responsive and awarded the contract to Datec on February 9.

On March 6, the protester filed a protest with our Office contending that rejection of its bid was improper, because it submitted the lowest-priced responsive bid. The protester further contends that the modems tested were technically and functionally equivalent to the modems it offered in its bid and that it would supply under the contract.

We find that Census improperly rejected Data Express' bid as nonresponsive. Therefore, we sustain the protest.

To be responsive, a bid must represent an unequivocal offer to provide the exact thing called for in the IFB such that acceptance of the bid will bind the contractor in accordance with the solicitation's material terms and conditions.

Westec Air, Inc., B-230724, July 18, 1988, 88-2 CPD ¶ 59. It is a fundamental rule of sealed bidding procurements that the responsiveness of a bid must be determined based upon the bid itself and not on the basis of post-bid-opening submissions. See Aldan Rubber Co., B-212673, supra. Where descriptive literature is required to be supplied for use in bid evaluations, a bid may be rejected as nonresponsive if the bid and the data submitted with the bid do not clearly show that the offered product complies with the specifications. TLC Systems, B-226531.2, July 30, 1987, 87-2 CPD ¶ 116.

The record shows that Data Express' bid was responsive. The IFB set forth a number of mandatory design and performance specifications to be met by the offered modems. In particular, the IFB, as amended, required that the modem "incorporate Microcom Network Protocol (MNP), class 2, 3, or 4, for maintaining data integrity." Data Express' bid specifically acknowledged each requirement and stated that the modems it offered would comply with each mandatory requirement. Data Express also included with its bid technical literature (as required by the IFB) as well as a user's manual fully describing the Western Datacom 424 MNP

class 4 modem it was offering. Nowhere did Data Express' bid take exception to any of the IFB's requirements.

While the technical evaluation team initially disqualified Data Express' bid on the sole basis that it did not indicate that the modems would provide a manual means of controlling the automatic answer capability as the IFB required, upon reevaluation the team determined that Data Express' bid did, in fact, meet this requirement because the modems contained a power switch and because the automatic answer capability would be disabled on power restart. We also note that the independent testing laboratory chosen by Census to test modems specifically stated that Data Express "submitted a satisfactory response to the solicitation." Accordingly, as Data Express' bid, including descriptive literature, took no exception to the IFB's requirements, the bid represented an unqualified offer to provide the exact thing requested by the IFB and was, therefore, responsive. Westec Air, Inc., B-230724, supra; see also Hicklin GM Power Co., B-222538, Aug. 5, 1986, 86-2 CPD ¶ 153.

Further, Census could not properly rely on the post-bid-opening performance testing to reject the protester's bid as nonresponsive. The record shows that Data Express told the Census and independent testing facility personnel at the test site that the modems furnished for the tests were Western Datacom's current production models which would be supplied to Census if Data Express were awarded the contract. Western Datacom itself later confirmed that information, stating that it had upgraded the modem bid by Data Express as of January 1, 1989, after bids were submitted on December 29, 1988, and thus that the current, upgraded model had been supplied for testing. A Western Datacom representative was also present at the testing and told the testers that the modems supplied for testing were identical to the modems proposed by Data Express in its bid, except for the labeling. Data Express' representative also certified in writing just before the modems were tested that the modems to be tested were "identical technically and functionally to the proposed model," and specifically told both the agency and test facility personnel that the modems furnished for testing were the same as those that would be supplied under the contract.

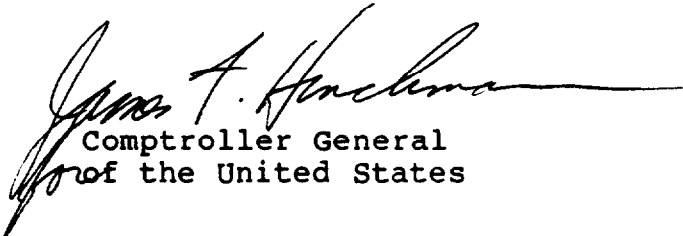
Under these circumstances, we think that Data Express is bound to provide the upgraded modems based on the representations the firm made to that effect at the actual testing, and because the IFB specifically stated that the modems submitted for testing were to be the same models as the modems offered in the bid. Moreover, Census' contention that the upgraded modems are nonresponsive because they

include a data compression feature that is not required by Census under the IFB provides no basis for rejecting Data Express' bid, because an offer to provide more than that which is required by the government under an IFB is responsive. See Emmett R. Woody, 63 Comp. Gen. 182 (1984), 84-1 CPD ¶ 123.

Finally, the agency argues that, in view of the contracting officer's doubts as to whether the product tested was the product upon which Data Express had based its bid and whether Data Express would supply the upgraded modems that passed the performance tests if awarded the contract, the contracting officer would not be able to make an affirmative determination of Data Express' responsibility. In view of our finding that Data Express had offered and would supply a conforming modem if awarded the contract, we are not persuaded by the agency's argument. Moreover, as Data Express certified in its bid that it is a small business, if the firm is found to be nonresponsible for any reason, the matter should be referred to the Small Business Administration for consideration under its certificate of competency procedures. Aldan Rubber Co., B-212673, supra.

Accordingly, we sustain Data Express' protest. By letter of today to the Secretary of Commerce, we are recommending that the contract with Datec be terminated and that the contract be awarded to Data Express, the lowest-priced bidder, if the firm is determined to be responsible. The contract with Data Express should reflect that Data Express will provide class 5 modems. In addition, we find that Data Express is entitled to the costs of filing and pursuing the protest, including attorneys' fees. See 4 C.F.R. § 21.6(d)(1) (1988).

The protest is sustained.


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